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Memorandum

To: Michael Madrid, Minerals/Lands Authorization Group,
Wyoming State Office, Bureau of Land Management

From: *Lowell Madsen*
Lowell Madsen, Assistant Regional Solicitor

Subject: Bonding Requirements for Lands Patented Pursuant to the
Stock-Raising Homestead Act

During John Kunz and my February 9, 2000, meeting with you and others from the Wyoming State Office and the Buffalo Field Office, we discussed several problems relating to the bonding requirements for oil and gas operations on lands patented under the Stock-Raising Homestead Act of December 29, 1916 (SRHA), 43 U.S.C. §§ 291-301. One of the problems arises from the directive in Instruction Memorandum No. WY-99-57 to use a single oil and gas bond issued pursuant to 43 C.F.R. § 3104, a 3104 Bond, to cover standard oil and gas operations as well as the compensatory damage provisions found in Section 9 of the SRHA. John and I were asked to determine whether the BLM and an oil and gas operator could agree to use two separate bonds, a 3104 Bond, to cover standard oil and gas operations and a 3814 Bond to satisfy the bonding requirements of Section 9 of the SRHA. It is our opinion that there is nothing in the relevant statutes or regulations to prevent the BLM from doing so. Indeed, the regulations, as currently constituted, require the use of the two bonds.

Section 9 of the SRHA provides that a person who has acquired from the United States the right to mine and remove the minerals reserved to the United States in lands patented pursuant to that Act may re-enter and use so much of the surface as may be required for all purposes reasonably incident to the mining and removal of the minerals. However, prior to re-entry, the person who has the right of re-entry must first (1) secure the written consent of the surface owner; or (2) reach an agreement with the surface owner as to the amount that will be paid to compensate for damages to crops or other tangible improvements that will result from mining and removing the reserved minerals; or (3) produce a good and sufficient bond to insure payment of damages

to crops or tangible improvements of the surface owner. 43 U.S.C. § 299.

The regulation 43 C.F.R. § 3814.1(c) (1998) provides that the bond required by Section 9 of the SRHA must be on Form 3814, a 3814 Bond.² This regulation has not been superseded or modified. The regulations do not provide, as they once did, that separate bonds for the protection of surface owners are no longer required. Nor is there anything in the current regulations authorizing the use of any other bond, such as a 3104 Bond, for that purpose. Indeed, according to the regulations in 43 C.F.R. Part 3104, such a bond would be inadequate.

A 3104 Bond does not cover damage to crops or other tangible improvements. A 3104 Bond covers only the plugging of wells, the reclamation of the leased lands, and the restoration of lands and surface waters. 43 C.F.R. § 3104.1(a) (1998).³ Nor does it appear that a 3104 Bond can be modified by increasing its amount to cover damage to crops or other tangible improvements. "[I]n

¹ The bond must be sufficient to cover damages resulting from the diminution of the value of the land for grazing purposes as well as the loss of crops and damage to tangible improvements. William and Pear Hayes, 101 IBLA 1101 (1988); William C. Hayes, et ux., 122 IBLA 68 (1992).

² The regulation 43 C.F.R. § 3814.1(c) (1998) provides that the "bond on Form 3814 must be executed by the person who has acquired from the United States the coal or other mineral deposits reserved." (Emphasis added.) Accordingly, only a properly executed bond on Form 3814 will satisfy the regulation, a regulation that is as binding upon the Department as it is upon those doing business with the Department. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Chapman v. Sheridan Wyoming Coal Co., 338 U.S. 621, 629 (1950); Alamo Ranch Co., 135 IBLA 61 (1996).

³ 43 C.F.R. § 3104.1(a) (1998) provides:

The bond amounts shall be not less than the minimum amounts described in this subpart in order to ensure compliance with the act [Mineral Leasing Act of 1920], including complete and timely plugging of the well(s), reclamation of the lease area(s), and the restoration of any lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations on the lease(s). . . .

no circumstances shall it [a 3104 Bond] exceed the total of the estimated costs of plugging and reclamation, the amount of uncollected royalties due to the Service, plus the amount of monies owed to the lessor due to previous violations remaining outstanding." 43 C.F.R. § 3104.5 (1998).

Accordingly, a 3104 Bond cannot be substituted for a 3814 Bond. In the absence of surface owner consent or an agreement as to the amount to be paid in damages, an oil and gas operator who wishes to re-enter lands patented pursuant to the SRHA must provide a 3814 Bond as well as a 3104 Bond.

The regulations do not, however, require the filing of a 3814 Bond separate from the filings that are associated with an Application for Permit to Drill (APD). A 3814 Bond and a 3104 Bond must be a part of an APD filed in connection with oil and gas operations on lands patented pursuant to the SRHA.

An APD must be accompanied by "Evidence of bond coverage as required by the Department of the Interior regulations," 43 C.F.R. § 3162.3-(d)(3). Those regulations require that a 3814 Bond, together with evidence of service of a copy of the bond on the surface owner, must be filed with the BLM. 43 C.F.R. § 3814.1(c). Accordingly, the APD must be accompanied by a 3814 Bond.

The procedural rights allocated to a surface owner in 43 C.F.R. § 3814.1 are preserved in the regulations governing the submission and approval of an APD. The BLM cannot approve a 3814 Bond until after 30 days from the date of its receipt have expired. 43 C.F.R. § 3814.1(d). An APD cannot be approved until it has been posted for public inspection for at least 30 days after its receipt. 43 C.F.R. § 3162.3-1(g) and (h). Thus, the BLM cannot approve the 3814 Bond submitted with an APD for at least 30 days after it is filed with the BLM. During the 30-day waiting period, a surface owner may "object" to the approval of the 3814 Bond. 43 C.F.R. § 3814.1(d). During the 30-day posting period for an APD, the BLM is to consult with "interested parties," 43 C.F.R. § 3162.3-1(h), which would normally include a surface owner. A surface owner must be given an opportunity to appeal from a decision approving a 3814 Bond. 43 C.F.R. § 3814.1(d). If the BLM approves an APD, thereby rejecting a surface owner's objection to the sufficiency of a 3814 Bond, the surface owner has the right to have the approval decision reviewed pursuant to the regulations 43 C.F.R. §§ 3165.3 and 3165.4.

In view of the above, it is clear that Instruction Memorandum No. WY-99-57, which provides that, insofar as oil and gas activities are concerned, a separate 3814 Bond is no longer required if an

operator provides a 3104 Bond, is inconsistent with current regulations.

IM WY-99-57 relies upon two Interior Board of Land Appeals decisions, Coquina Oil Corporation, 41 IBLA 248 (1979), and Theo Gassin, 55 IBLA 257 (1981). When those decisions were issued by the IBLA, a departmental regulation specifically provided that "Separate bonds for the protection of surface owners are no longer required." 43 C.F.R. § 3104.2(d) (1979). That regulation was deleted when 43 C.F.R. Part 3100 was revised in 1983. See 48 Fed. Reg. 33662, July 22, 1983.⁴ Because the regulation was deleted, both Coquina and Gassin were effectively overruled by the IBLA in Gary Maughan, 105 IBLA 206 (1988).⁵

In Maughan, the Board held that the regulations in effect when that decision was issued in 1988 did not provide that a separate bond was not required. 105 IBLA at 209. As the pertinent regulations in effect when Maughan was issued are the same as the current pertinent regulations, it follows that, as shown above, the current regulations do not provide that separate bonds are not required.

It should be noted that the regulation 43 C.F.R. § 3814.1(d) gives either a surface owner or a mineral developer 30 days within which to appeal to the "Director of the Bureau of Land Management" from a decision by an authorized officer regarding the adequacy or inadequacy of a proffered bond. The IBLA has held that such appeals are properly made to that Board rather than the Director. Brock Livestock Co., Inc., 101 IBLA 91, 97 n.6 (1988). The Board held:

The regulation codified at 43 C.F.R. § 3814.1 was promulgated prior to the creation of this Board and describes an appeal procedure which is no longer in effect. Since none of the limitations upon Board jurisdiction enumerated at 43 C.F.R. § 4.410(a) apply, in this circumstance appeal is properly made to the Board.

⁴ There is nothing in the preamble to the regulations published in 1983, or in the preamble to the regulations currently in effect, published in 1988, to explain why the Department eliminated the regulation providing that separate bonds for the protection of surface owners were not required. See 48 Fed. Reg. 33653, July 22, 1983, and 53 Fed. Reg. 22820-21, June 17, 1988.

⁵ On reconsideration, Maughan was modified in part on a point not relevant here. See Gary Maughan, 105 IBLA 210A (1989).

The Board also held that 43 C.F.R. § 4.21(a) would suspend the finality of the BLM's decision regarding the adequacy of a bond pending the appeal. 101 IBLA at 97. However, Brock involved a bond filed by a mining claimant.⁶ It is our opinion that a decision regarding the adequacy of a 3814 Bond, which must be submitted by an oil and gas operator as a part of an APD on lands patented pursuant to the SRHA, is subject to review and appeal pursuant to the regulations in 43 C.F.R. Part 3165. The regulation 43 C.F.R. § 3165.4(c) provides that decisions issued under Part 3100 shall remain effective pending review unless the IBLA determines otherwise in response to a petition for stay.

To summarize, it is our opinion that one who wishes to conduct oil and gas operations on lands patented pursuant to the SRHA must, in the absence of a waiver or an agreement to pay damages, submit a good and sufficient bond on Form 3814 to insure the payment of damages to crops or other tangible improvement on the surface of the land in addition to the bond required by 43 C.F.R. Part 3104. It is also our opinion that a decision approving an APD over an objection by a surface owner that a 3814 Bond is inadequate will be in full force and effect pending appeal unless a stay is granted by the IBLA.

⁶ The 1916 Stock-Raising Homestead Act was amended by the Act of April 16, 1993, 43 U.S.C.A. § 299, which deals with the location of mining claims on lands patented under the 1916 Act.